United States Court of Appeals

for the Second Circuit

INTERVENOR'S BRIEF

B
Ars

74-2384, 75-4001

UNITED STATES COURT OF APPEALS

For the Second Circuit

Nos. 74-2384, 75-4001

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

-against-

LOCAL 456, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Respondent,

J.R. STEVENSON CORP.,

Intervenor.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF AND SUPPLEMENTAL APPENDIX FOR INTERVENOR, J.R. STEVENSON CORP.

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2

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

OTHER AUTHORITIES:

STATEMENT OF ISSUES PRESENTED

1. Whether substantial evidence on the record considered as a whole supports the Board's holding affirming the Administrative Law Judge's findings that the Respondent Union violated §8(b)(6) of the Act as of July 1, 1973 by causing Intervenor, J.R. Stevenson Corp., to pay for the services of Arpad Korchma, which services were not needed or desired by the Company, were not performed, and were not to be performed.

2. Whether the Board erred in reversing the Administrative Law Judge's findings of facts and conclusions of law by holding that Respondent Union did not violate §8(b)(6) of the Act prior to July 1, 1973 by causing Intervenor, J.R. Stevenson Corp., to pay for the services of Arpad Korchma, which services were not needed or desired by the Company, were not performed, and were not to be performed, on the grounds that the prior contract was executed and the employee in question hired prior to the §10(b) period.

STATEMENT OF THE CASE

This case is before the Court upon the application of the National Labor Relations Board (herein sometimes referred to as "NLRB" or "the Board") pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. §151, et seq.; herein referred to as "the Act"), for

enforcement of its Order issued August 22, 1974, against Respondent, Local 456, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein, "the Union"). The Board's Decision and Order are reported at 212 NLRB No. 145 (1974), (A.11-22). 1/

This case commenced on July 9, 1973, when J.R. Stevenson Corp., the Intervenor, (herein sometimes referred to as "Stevenson" or "the Company") filed an unfair labor practice charge against the Union, charging a violation of §8(b)(6) of the Act. The NLRB issued a complaint against Respondent and a notice of hearing on September 28, 1973. Hearings were held before Administrative Law Judge Bernard J. Seff, who issued his Decision and Order January 17, 1974, (A.2-10). Upon consideration of exceptions by both Respondent and the Company to the Administrative Law Judge's Decision and Order, the Board issued its Decision and Order, enforcement of which is sought herein.

This Court has jurisdiction of this proceeding, the unfair labor practices having occurred in Westchester, New York, where the Company was engaged in a construction project. No jurisdictional issue is presented.

1/ "A" references are to the printed Appendix submitted by the NLRB. "S.A." refers to portions of the record omitted from the Appendix, which are printed as a Supplemental Appendix to the brief. "GX" refers to the NLRB General Counsel's Exhibits, followed by the page reference to the Appendix. "RX" refers to the Respondent's Exhibit, which is not reproduced in the Appendix or Supplemental Appendix.

THE FACTS

At all times material herein, Stevenson was engaged as a general contractor pursuant to a twenty-one million dollar contract with the County of Westchester, State of New York, in connection with the construction of a courthouse complex located in White Plains, New York, herein referred to as the job site, (GX.I(c), not reproduced in the Appendix). Work on the job site began on March 19, 1970 (A.85) and the expected completion date was December 31, 1973, (A.51).

As general contractor, Stevenson performed certain aspects of the project directly with its own employees and subcontracted other aspects to contractors. The first work to be performed at the site was piling and foundation work which had been subcontracted to Bombace, (A.175-77), and Stevenson therefore had no one on the job except, occasionally, its concrete superintendent, a supervisory employee (id.).

Nevertheless, Stevenson was approached by the Respondent Union and asked to sign a contract. After the Union picketed for two days, a contract was executed on May 20, 1970, which by its own terms was to expire approximately one month later, on June 30, 1970, (A.51-53, 80, 81; RX.1 (contract effective May to June 30, 1970) not reproduced in the Appendix).

A second agreement effective July 1, 1970 thru June 30, 1973 was subsequently executed by both parties, (GX. 2; A.23-33).

In April, 1973, the Union notified Stevenson that it wished to "terminate" the existing agreement and offered to negotiate a new one, (GX. 5; A.34). Stevenson responded by letter, noting that "we do not employ Teamsters in any of our operations nor do we have a need to employ such labor", (GX. 6; A.35). Stevenson offered to negotiate a new contract if and when its operations should require teamster labor in the future (id.).

Stevenson thereafter laid off the "shop steward", Arpad Korchma, who had been carried on its payroll pursuant to explicit provision of the expired contract. "Shop steward" Korchma refused to accept his final pay check and warned of resulting pickets, (A. 60-1, 62-3, 114-15, 127-29, 213-14). Korchma picketed the job site on July 3, 5, 6, and 9 (id.). Because of the picketing, Stevenson submitted to the Union demands and signed the contract which had been negotiated by the Union with employer associations for some of its members and which Stevenson apparently had not previously seen, (A.197-99; GX. 8, A.38-48). Stevenson rehired Korchma the next day and the picketing stopped (id.).

This collective bargaining agreement, currently in effect at the time of the Hearings herein [3/] (GX.8) provides for

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3/ Except as noted below, the current agreement is identical to the prior two in those relevant, non-economic provisions discussed herein. The current contract, however, is substantially more costly for Stevenson in the area of wages and fringe benefits.

exclusive recognition of Respondent for all employees in a minutely defined unit, (GX. 8: Article I(1), A. 38). The unit covers chauffeurs for a long list of trucks and tractors (id.). It provides for a Union hiring hall if the employer needs "additional help", (id. I(5), A.39; id., XIX (16), A.47). It provides for a minimum of eight (8) hours for any employee "assigned to work on any day" (id. III(3), A.41). It requires that hired equipment be operated by a Union employee or, at the very least, in accordance with the provisions of the contract, (id. VII, A.43).

The Agreement also provides:

> On outside construction job sites, the Employer shall supply a heated trailer with telephone for employees covered hereby.
>
> A shop steward shall be assigned each supply yard and each road - and building - construction job site at all times, and shall be furnished with vehicle for means of transportation. If an Employer has more than one such job site in operation, a shop steward will cover all of such job sites. The shop steward may be assigned the duties of a safety coordinator at the discretion of the Employer and under the direction of the Employer, (id. XIX(2), (3), A.46). 4/

Pursuant to this requirement, Stevenson paid Victor Toran from May, 1970, until January, 1972, when he retired. Thereafter

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4/ The prior agreements do not include the last sentence of GX. 8: Article XIX(3). (RX; GX. 2: XIX(3), A.32).

it carried Arpad Korchma on the payroll until the June 30, 1973 expiration of GX. 2. Stevenson "rehired" Korchma on July 10, 1973, as a result of the Union picketing and still carried him on the payroll as of the hearing.

It is undisputed that Toran and Korchma each spent most of their active time checking truck drivers driving on the site to make sure that they were Teamster Union members, (A. 54-6, 63, 65-6, 89-91, 92-4, 97-9, 113-14, 126, 127, 137, 157, 161-63, 166-67, 205-05, 208-08, 218-20, 224-26, 227-31). It is also undisputed that this effort was not undertaken at the request or for the benefit of the employer (id.). There is no claim that this effort is bargaining unit work under Article I of the Agreement, or that it involves particular chauffeur skills, or that it is generally performed by "chauffeurs" in the industry.

When asked to perform traditional chauffeur duties, Toran refused, contending that there must be a "Shop Steward" on the job to check the trucks and that another Teamster would have to be employed for chauffeuring, (A.76-7, 90).

Toran performed no unit work for Stevenson and throughout his employment there was virtually none to perform, (A. 54-6, 63, 72, 73, 75-6, 91-7, 111-13, 136, 226-27).

Korchma was hired on January 12, 1972. He too performed no unit work for Stevenson and throughout his employment; there

was virtually no unit work to be performed (id.). 5/

It is undisputed that no truck could come on the site unless Korchma approved the driver or agreed to special terms under which it was allowed on the site, (A.226-35). When not approving driver status, Korchma resided in his heated trailer, (A.227).

5/ At the very most, the Respondent witnesses testified that Korchma spent at least an average of seven and one-half hours (7-1/2) of an eight (8) hour day waiting around in case the Company should need to ask his permission for a laborer to use his own truck for incidental jockeying (i.e., on site hauling), (A.215). A laborer's truck had been used less than a total of 120 hours since May, 1970, (A.54-6, 63, 72, 73, 75-6, 91-7, 98-9, 111-13, 136, 226-27).

POINT I

THE NATIONAL LABOR RELATIONS BOARD's CONCLUSION THAT RESPONDENT UNION VIOLATED § 8(b)(6) OF THE ACT AS OF JULY 1, 1973, IS SUPPORTED BY SUBSTANTIAL EVIDENCE ON THE RECORD CONSIDERED AS A WHOLE.

Summary

The Board, affirming the finding of its Administration Law Judge, held that since July 1, 1973 Korchma "has not performed any Teamster duties and Stevenson has had neither a need nor a desire for him to perform any." (A.20). We respectfully show in Part "B" below that this conclusion is solidly founded in substantial evidence on the record considered as a whole, (Cf. Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951)) and that it falls well within the statutory proscription of §8(b)(6). We further show in Part "A" that even the Respondent-proferred testimony (which the Administrative Law Judge and the Board properly rejected as incredible in light of the weight of evidence) tends to prove only that Intervenor, J.R. Stevenson Corp., was required to pay Korchma for "standing-by" or for its substantial equivalent, and that this in itself falls within the area of proscribed conduct as delineated by the Supreme Court.

A. In NLRB v. Gamble Enterprises, Inc., 345 U.S. 117 (1953), the Supreme Court delineated a statutory distinction between a

bona fide offer of relevant, though unwanted, services on one hand and an offer of stand-by services on the other. It said:

> We are not dealing here with offers of mere "token" or nominal services. The proposals before us were appropriately treated by the Board as offers in good faith of substantial performances by competent musicians. There is no reason to think that sham can be substituted for substance under §8(b)(6) any more than under any other statute. Payments for "standing-by", or for the substantial equivalent of "standing-by", are not payments for services performed, but when an employer receives a bona fide offer of competent performance of relevant services it remains for the employer, through free and fair negotiations, to determine whether such offer shall be accepted and what compensation shall be paid for the work done. (Id. at 123-24).

In that case, an earlier but abandoned Union proposal, which would have required the employment of a pit orchestra of local musicians to play overtures, intermissions and music to leave by whenever a travelling band performed on the stage, was considered by the Court to be illegal as an offer of token or nominal services. The final Union proposal whereby a local orchestra would be employed to perform for an entire evening on some number of separate occasions having a relation to the number of travelling band appearances was held to be a bona fide, though admittedly unwanted and unneeded, offer of competent performance of relevant services and hence outside the proscriptive ambit of §8(b)(5).

In the instant case, the overwhelming weight of evidence supports the Board's and the Administrative Law Judge's findings that Arpad Korchma performed no relevant services since the charging party was last forced by Respondent's picketing in early July, 1973 once again to pay him weekly fees, (A.222-24, 227).

Further, it is not even contested that for at least an average of 7-1/2 of the 8 straight-time hours for which Mr. Korchma was paid handsomely, 6/ he was on stand-by allegedly, in his own words: to "observe what goes on in case they have to use the truck, I am there, right there, they ask me. I am always around when they need me, that's the way I looked at it." (A.214).

Clearly, Korchma's own testimony brings his "services" well within the Court's delineated proscription.

Respondent may argue that Korchma was available to perform chauffeuring work but the employer failed to utilize him. We respectfully argue below that the overwhelming weight of evidence

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6/ Korchma was paid more than $25,000 a year in wages on a scale yielding $12,000 in straight-time pay, (A.74, 75). Under the new scale of $65 a day (at the minimum-see GX. 8: II(1)&(2); (A.39-40)) his straight-time pay will equal $16,900 for an estimated gross of over $33,000 a year. Moreover, his heated office trailer and phone cost at least $9 or $10,000 (id.). Finally his fringe benefits costs the employer approximately 40% of wages or approximately $8,000 (GX. 8: III, IV, V, IX, X, XVI, XVII; A.41-6). Stevenson's total cost the first year of the contract, it is submitted, will come to $50,000 a year.

disproves this contention and that, indeed, the credible evidence proves that the Union consistently would not allow the steward to perform any unit work for the employer. (infra 15-17).

However, even assuming arguendo that Korchma was available for such work, Respondent's contractual requirement clearly falls well within §8(b)(6) of the Act.

Jovene, Knesich, Biordi, and Bostick all testified that Stevenson's need for unit work (i.e., jockeying on the site and driving between Company sites) was infrequent and capable of accumulation, (A.72-3, 93-6, 111-13, 138, 226). The maximum estimate of past driving time did not exceed a total of 160 hours over the 3 year plus life of the project, (A.72). 7/

It is undisputed that there is a universal practice in the Trucking industry for securing Teamster employees by the day through the Union hiring hall, (A.147-49, 179-80, 211; GX. 8: III(3), XIX(16), A.41, 46). Indeed, Union official Leggio testified that this practice is allowed for construction jobs less than $2.5 million in value regardless of actual trucking needs (which, he concedes, vary) but prohibited for jobs exceeding

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7/ Indeed, Korchma's own testimony was that there were weeks when no driving was needed and weeks when driving was needed for a part of 3 days, (A.209). Korchma didn't have any thought as to what he would be doing when not driving, (A.210), although he knew that the laborer was working at his trade (id.).

that figure--even if the particular employer's trucking needs are de minimus, (A.190-93).[8/] Respondent clearly asserts a contractual requirement that a full-time Teamster member be employed regardless of lack of available work and even if the work could be accumulated into a block of time, (A.218-19). Respondent clearly demands not that existing work be performed exclusively by its members and regardless of the employer's appreciation of the value to him of the work; but that a full-time Union member be employed even where there is a clear and demonstrated absence of any unit work to be performed. This is a far more serious exaction than forced musical overtures, which itself is illegal (supra).[9/]

8/ Obviously, the direct trucking needs of a general contractor vary in accordance with the job aspects assumed directly by the general contractor as opposed to those subcontracted out to other contractor(s). In addition, the nature and size of the building to be erected affect the trucking needs as well. Finally, the number of local jobs simultaneously undertaken by the general contractors will have a significant bearing.

9/ It is directly analogous to the 50% of idle time found violative of §8(b)(6) in Metallic Lathers Union of N.Y., etc., Local 46, 207 NLRB No. 111 (1973); 29-CB-1260 at pg. 13.

Toran testified concerning alleged assignments by the employer of the task of counting someone else's carting loads, which would be of no concern to Stevenson as opposted to his subcontractor, (A.176-77). Toran and Korchma both testified concerning other alleged assignments relating to parking lot director, keeper of the gates, and traffic director. Each employer witness disputed these allegations-credibly, we respectfully submit. Indeed, it boggles the mind to contemplate construction workers parking in roadways and blocking entrances but for the timely intervention of a $50,000, one-hour-a-day traffic monitor.

We respectfully submit that such non-unit services, even if offered, would not be deemed relevant services, under the Supreme Court test, Further, it is undisputed that none of these alleged services were performed by Korchma since his forced reinstatement on Stevenson's payroll, (A.213-14).

Respondent has argued that the fact that there is and has been an agreement with the employer to pay Korchma precludes the finding of a §8(b)(6) violation. 10/ Such an argument, we respectfully suggest, is patently erroneous under the explicit wording of the statute and under the Supreme Court's interpretation.

Section 8(b)(6) clearly and explicitly covers the situation where the Union causes an employer to agree to pay money in the nature of an exaction for services not to be performed. There is nothing in logic or statutory construction to suggest that the employer's agreement must be in a separate document or arrangement (as opposed to a collective bargaining agreement) to render the Union's effort illegal. This should be particularly true in the instant case where the employer's "negotiation" is limited to accepting or rejecting a standard industry agreement previously negotiated by others. Moreover, the Court in NLRB v. Gamble Enterprises, Inc., supra, clearly distinguishes between offers of "mere 'token' or nominal services" which are illegal and a "bona fide offer of competent performance of relevant services".

10/ The Board's analoguous holding with respect to the predecessor collective bargaining agreement is treated below in Point II.

Only in the latter instance is it incumbent upon "the employer, through free and fair negotiation, to determine whether such [an] offer shall be accepted and what compensation shall be paid for the work done." Similarly, the existence of a long-standing bargaining relationship between the Union and employer in Gamble (some 57 years) would not, the Court stated, have immunized from illegality the earlier, rejected Union proposal for largely stand-by orchestra performance.

Moreover, the Respondent's arguments based on Stevenson's consent is particularly disingenuous here, for Stevenson had resisted the Union's latest demand precisely on §8(b)(6) grounds, (GX. 6, A.35); it is uncontroverted that the Union picketed because of this refusal, (A.127-29); and the instant charge was executed and docketed prior to Stevenson's forced surrender. 11/

B. While the Respondent-proferred evidence itself would establish only that the Intervenor was required to pay for "standing-by" services in violation of the Act, we respectfully

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11/ Whether the employer's agreement with the Union is direct or by means of a multi-employer association agency is, we submit, completely irrelevant. In the instant case, Stevenson had direct contract privity with the Union, (RX. 1; GX. 2, A.23 et seq.; GX. 8, A.38 et seq.). Certainly, the Union so regarded the relationship, (GX. 5, A.34). Respondent introduced certain documents purporting to show a contractual relationship between the Building Institute, of which Stevenson was a member, and the Union. However, there is no competent evidence to suggest that Stevenson had a contractual relationship with the Union through said association.

submit that the substantial weight of evidence wholly supports the conclusion of the Administrative Law Judge, affirmed by the Board's holding, that Respondent further violated §8(b)(6) of the Act by causing Stevenson to pay a member of its labor organization for services which were not in any part performed and which were not to be performed at all.

Bostick, Biordi, Knesich, and Jovene all testified that Korchma and Toran performed no chauffeuring services whatsoever for Stevenson, (A.54-7, 63, 91, 92, 95-6, 98-9, 135-36, 222-24, 227). 12/ Knesich testified that Toran refused to do any chauffeuring unless another Teamster Union employee was hired, (A.89-91). Jovene reluctantly accepted this refusal as a fact of construction Union life, (A.130) and Stevenson supervisors related to Korchma and Toran as a Local 456 official on the job to police adherence to the local's rule that all drivers coming on a construction job must be Teamster Union members, (A.98, 126, 136, 223). Indeed, although Bostick was Stevenson's superintendent on the job, he wasn't even sure that Korchma was on the Stevenson payroll, (A.222-23). Korchma himself admits that during his year and one-half on Stevenson's payroll, "nobody approached" him and he received no "instructions" as to what he should do, (A.204). Toran testified that he didn't complain to the Union concerning the laborer's driving of his own pick-up truck five or six times

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12/ Indeed, Korchma concedes that he did no such work since July, 1973, (A.213-16). Indeed he conceded that he virtually did nothing (i.e., not even non-unit, non-relevant work) since that time, (A.213).

(even though the Union now claims it was willing and even eager to drive) because the Company explained that it was just test-driving the "older pick-up truck" to see if it should be purchased, and that this explanation allegedly struck him as reasonable. Finally, Knesich testified that Korchma suddenly developed an eagerness to drive some 2-1/2 months after the instant charge was filed and around the time that the General Counsel issued the Complaint herein, (A.107-111, SA.1).

We respectfully submit that the Union's denial of its continued refusal to allow the shop steward to drive is patently absurd. The Union would ask this Court to believe that a successful contracting firm expended way in excess of $85,000 for a non-operating teamster employee merely because it was too shy to ask him to work or too preoccupied to respond to his pleadings for work, (A.75-76; footnote 6 above). If Korchma had been willing to work, Stevenson would have known it well in advance of Union Counsel's proclamations at the Hearing, (A.109-111, SA.1). Construction industry relationships are not known for their formality and ceremony.

Aside from the absence of any heuristic credibility for its position, the very actions of the shop steward reveal his purpose and function. It is undisputed that the shop steward was largely preoccupied in checking on the Union status of all drivers

appearing on the site, (A.76-7, 91-4, 98, 113-14, 126, 127, 137, 157-58, 160-63, 166-67, 180, 206, 208-09, 220.) This function was conceded to be directly related to the status as shop steward, (A.160-61, 162-63, 166-67, 208-09.) Indeed, the shop steward insisted on being present at the site whenever there was any possibility of a delivery or pickup being made, (A.113-14, 127, 205). It is undisputed that the employer's work requirements would be wholly unaffected by the union or non-union status of any driver, (A.93-4, 137, 227-28). 13/ Finally, the nature and efficacy of Korchma's actions upon discovering a non-union driver clearly identify his true purpose and role

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13/ Korchma's attempt to explain his checking of driver status as a personal policy is more revealing of his lack of credibility than of his function (compare his testimony at A.218 with that at A.205-06, 208-09, 220).

(A.228-31): without his approval, no truck could unload at the site (id.). 14/

We respectfully submit that the Union insisted, expected, and insured that the shop steward (first Toran and then Korchma) serve a uniquely union function and that no unit (i.e., "relevant") task on behalf of the employer was to interfere with his policing

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14/ Korchma would not allow a non-union driver to make his delivery unless the company employing him gave Korchma a check, presumably for the Teamster Fund. On one occasion, Korchma would not accept a check directly from the company (Flush Meadow) making the delivery, but required that the check come through Stevenson before he would allow the delivery, (A.227-30).

The very wording of the subject collective bargaining agreement reveals that Korchma's presence served the Union's purpose and not that of the employer, (GX. 8: XIX(2), (3); A.46). For if the steward is to perform a unit work or chauffeuring function, why must he, alone among the trades, be provided with a heated office with an extensively used telephone (id. at (2); A.46). Moreover, the contract which clearly delineates every kind of truck connected with unit work (GX. 8: (I); A.38) requires that the steward be provided with a "vehicle for means of transportation" as opposed to a "truck" (GX. 8: XIX(3); A.46). Finally, the contract clearly provides that the steward may be assigned the duties of safety coordinator, thus excluding by clear negative implication any other assignment (id.). Even this limited commitment to work is disengenuous, as there is not one iota of evidence to suggest that either Toran or Korchma were remotely competent to perform this very technical and now highly important statutory function, or that either was willing to perform it, or that an employer would be trusting enough to delegate this crucial role to a non-managerial and non-supervisory "employee" who was also the Teamster representative on the job.

activities on behalf of the Union. The only connection between the steward and Stevenson was that the general contractor was "nominated" to foot the bill for the Teamster policing of the entire job. Surely, this is the most obnoxious "exaction" conceivable and the clearest form of prohibited featherbedding under §8(b)(6) of the Act.

We respectfully submit that the National Labor Relations Board properly concluded on the basis of substantial evidence on the record considered as a whole that the Respondent violated §8(b)(6) of the Act on or about July 1, 1973, and thereafter.

POINT II

THE NATIONAL LABOR RELATIONS BOARD ERRED IN REVERSING THE ADMINISTRATIVE LAW JUDGE'S FINDINGS OF FACT AND CONCLUSIONS OF LAW AND IN HOLDING THAT THE §8(b)(6) VIOLATION OCCURRED ONLY UPON THE ADVENT OF THE MOST RECENT PICKETING BY RESPONDENT UNION AND NOT BEFORE.

Administrative Law Judge Bernard J. Seff held (A.8) that the Respondent Union violated §8(b)(6) of the Labor Management Relations Act, and ordered that the Union reimburse Intervenor J. R. Stevenson for all wages paid to Arpad Korchma for services not performed by him for the entire period not barred by Section 10(b) of the Act, i.e., since January 9, 1973. (A.9).15/

However, the three-member Board panel modified the findings of the Administrative Law Judge, holding that Respondent violated Section 8(b)(6) only from on or about July 1, 1973 (A.11). It therefore ordered reimbursement only as of July 1, 1973 rather than from January 9, 1973. (A.21). 16/ Intervenor respectfully submits that this modification by the Board was erroneous, that the Respondent Union violated §8(b)(6) prior to July 1, 1973, and that Respondent should be required to reimburse J. R. Stevenson Corp. for all reasonable costs directly incurred within the §10(b) period.

15/ The charge, dated July 5, 1973, was filed July 9, 1973 so that the §10(b) limitation extends back in time to January 9, 1973.

16/ The Board properly held that the reimbursement should include all reasonable expenditures directly incurred in its employment of Korchma, and not just wages. (A.21).

The Board failed to find a violation of 8(b)(6) with respect to activity prior to July 1 on two grounds: (1) that "with respect to Korchma's employment history prior to his discharge on June 30 and subsequent rehire on July 10, the evidence is in considerable conflict as to what work, if any, he performed or offered to perform, and the Administrative Law Judge failed to resolve this conflict by making specific credibility resolutions" (A.15), and (2) that the initial hiring of Korchma occurred in January 1972, pursuant to a "valid collective bargaining agreement entered into between Stevenson and Respondent in 1970", both of which events occurred outside the Section 10(b) limitations period (A.15).

The Board was clearly in error with respect to the first of these grounds. The Administrative Law Judge clearly and specifically concluded that no work was performed or offered by Korchma prior to his discharge on June 30, stating:

> It is clear from the testimony in the record that Korchma performed no duties of any kind whatsoever during the entire time that he was paid $20,000 a year to occupy a heated trailer. (A.5; emphasis added)

We respectfully submit that the Administrative Law Judge properly resolved any conflict in evidence and clearly stated his conclusion. The Board has cited no authority disqualifying the Judge's conclusion solely on the grounds that he failed to invoke a favored incantation (i.e. "specific credibility resolution")

to express his findings. Significantly, the Board does not assert that the conclusions lack support in the record, but only that it was not explicitly expressed in terms of credibility. It is obvious, we submit, that where there is (Union) testimony on one side of an issue, and (Company) testimony on the other, the very conclusion itself by the Administrative Law Judge that the latter version is fact constitutes a credibility resolution.

Moreover, we respectfully submit that the Union testimony is so sketchy and inherently incredible, and the Company testimony is so overwhelming and contextually consistent with the uncontroverted facts, that the Administrative Law Judge's conclusion necessarily follows from a weighing of the evidence.

Bostick, Biordi, Knesich, and Jovene all testified that Korchma performed no chauffeuring services whatsoever for Stevenson at any time, including the period between January 9 and July 9, 1973. (Supra, at 15). Jovene testified (A.56) that Korchma never drove a truck owned, operated or leased by J. R. Stevenson. Knesich, the Company's general superintendent, testified that he never saw Korchma do any work for Stevenson (A.92), that Korchma merely checked the trucks coming in and out of the job to see if they were manned by teamster drivers (id.), and that Korchma had no company function or assignment (A.96). The former project manager, Biordi, also testified that Korchma performed no services for Stevenson, that he would stay in his trailer when not checking truck drivers' identification. (A.126, 136-137). Bostick, the

project superintendent who replaced Biordi in July, 1973, also testified that Korchma performed no work for Stevenson. He wasn't even sure that Korchma was on the Stevenson payroll. (A.222-224, 227).

The undisputed testimony of Jovene, Knesich, Biordi and Korchma himself was that Korchma's "function" prior to July 1 as well as after was to see that the trucks entering and leaving the jobsite were driven by Teamsters; and the overwhelming weight of testimony proves that Korchma spent the rest of his time in the heated trailer. (A.76-7, 92-4, 98-9, 113, 126-27, 137, 200, 205-06, 208-09, 220; c.f. 160-62, 166-67). Even when Korchma was asked not to come to the jobsite, he insisted on being present (at overtime wage rates) when he thought a delivery or pickup would be made that day (A.205, 113-14, 127). It is also undisputed that Korchma did not perform these "services" on behalf of or at the behest of the employer, which had no interest in the Union status of any driver except as the Local 456 steward might disrupt the progress of deliveries. (A.93, 137, 227-28).

Against the weight of all the foregoing evidence, the Union makes only two assertions: (1) that Stevenson had some inter-job trucking and on-site jockeying which might have been done by Korchma before and after July 1, 1973, and (2) that Korchma did perform certain "duties" prior to July 1, 1973, such as opening the gates to the job project, parking cars and keeping the roadway clear.

As to the first of these assertions, it is clear from the record that Stevenson's need for unit work was infrequent, capable of accumulation, and de minimus, totalling no more than 160 hours over the three-year plus life of the project. (A.72-73, 93-96, 111-113, 138, 200, 226). Yet John Leggio, President of Local 456, testified that while employer contractors with jobs worth less than $2.5 million may secure Teamster employees by the day to conform to accual trucking needs, a contractor such as Stevenson with a job exceeding $2.5 million cannot obtain day work and must employ a Teamster full time, even though his trucking needs are de minimus and despite lack of available work. (A.190, 191-93).

With regard to the second assertion, aside from its inherent implausability, the overwhelming weight of testimony refuting it, and the Board decision affirming its Administrative Judge's finding that the events never occurred, it is clear from Korchma's own testimony (A.215) that at the very most he spent at least an average of seven and one-half (7½) hours of an eight (8) hour day on standby, waiting around lest the Company need to ask his permission for the laborer to use his own truck, and that neither this nor the other "duties" allegedly performed by Korchma were performed at the behest of Stevenson's project superintendents.

Finally, we submit, that even accepting all of Korchma's testimony, the alleged work adds up to no more than "the substantial equivalent of 'standing by'... [and not] competent performance of relevant services." (NLRB v. Gamble Enterprises, Inc., supra.).

Thus, the record as a whole overwhelmingly supports the Adminis-

trative Law Judge's conclusion "that Korchma performed no duties of any kind whatsoever during the entire time he was paid $20,000 a year to occupy a heated trailer", (A.5, emphasis added), including the period January 9 to June 30, 1973; and the record as a whole supports Intervenor's assertion that Stevenson had no need or desire for Korchma's services at any time, either before or after June 30, 1973.

It would appear, then, that the Board's main concern in modifying the Administrative Law Judge's finding as to the date of the initial violation, was the 6 month limiation period set forth in Section 10(b) of the Act. The Board states that Korchma was hired in January, 1972, pursuant to a "valid collective bargaining agreement entered into between Stevenson and Respondent in 1970", and that since both events are beyond the 10(b) period the Board refuses to presume that the initial hiring of Korchma was other than "fair and regular". (A.15).

This rejection of an unproferred and highly dubious presumption begs the question. The issue is not whether Respondent violated the Act when Korchma was initially hired or when the first picketing resulted in the May, 1970 contract. Both of these events concededly antedate the 10(b) period. The question is whether Respondent thereafter violated the Act within the 10(b) period by causing Stevenson to pay Korchma from January 9 to June 30 of 1973 for services not performed and not to be performed.

The Board seems to be holding that, given the existence of a contract executed prior to the 10(b) period, the enforcement of that contract cannot constitute a violation of §8(b)(6) regardless of the facts existing during the 10(b) period. Thus, the Board cites the Bryan Manufacturing Co. case (Local Lodge No. 1424, I.A.M., AFL-CIO v. NLRB, 362 U.S. 411 [1960]), not only for the narrow and obvious proposition that evidence about Toran in 1971-72 may not be taken as conclusive as to Korchma in 1973, but apparently for the more questionable proposition that a contract executed prior to the 10(b) period insulates all acts of compliance from §8(b) attack (A.15).

We respectfully submit that such a holding does violence to the very language and intent of the statute; misconstrues the Court's holding in the Bryan Mfg. Co. case, supra; distorts logic; and undermines the policy of the §8(b)(6) prohibition. §8(b)(6) states:

> It shall be an unfair labor practice for a labor organization or its agents to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other things of value in the nature of an exaction for services which are not performed or not to be performed. [emphasis added]

The statutory language is not limited to the causing of an employer to agree to pay money; it reaches the actual causing to pay as well. (Contrast §8(e) - "entering into an agreement.")

The statutory language carefully delineates a very mild threshold of persuasion. Unions are prohibited from causing or attempting to cause. There is no requirement of "threatening, coercing, or restraining" (contrast §8(b)(4)(ii)), nor even of "forcing or requiring" (contrast §§8(b)(4)(A), (B), and (C)). 17/

We respectfully submit, therefore, that the Board's focus is misdirected. There is no need for an act of picketing such as that which occurred in July 1973, forcing Stevenson to rehire Korchma, or that which occurred incident to the signing of the first contract (RX.1). The very act of causing Stevenson to pay for services not performed during the §10(b) period constitutes a violation of §8(b)(6).

That the Board is employing the wrong standard for determining §8(b)(6) conduct is further manifest from its citation of the Bryan Mfg. Co. case, supra. That case concerned an unfair labor practice complaint predicated on the enforcement and maintenance of a union-shop security clause that was executed at a time, prior to the 10(b) six months limitations period, when the union did not represent a majority of the Company's employees. The Court held that:

17/ The Board makes a passing reference to the statutory language "in the nature of an exaction". (A.20). This language, we respectfully submit, was intended to modify the meaning of the non "performance of services" and was not designed to denote an improper or coercive "causing". See the colloquy between Senators Taft and Pepper, II Legislative History of the Labor Management Relations Act, 1947, 1544-45 (GPO, 1948).

> [w]here...a collective bargaining agreement and its enforcement are both perfectly lawful on the fact of things, and an unfair labor practice cannot be made out except by reliance on the fact of the agreement's unlawful execution, an event which, because of limitations, cannot itself be made the subject of an unfair labor practice complaint, ... permitting resort to the principle that §10(b) is not a rule of evidence, in order to convert what is otherwise legal into something illegal, would vitiate the policies underlying that section. [362 U.S. at 419, Emphasis added.]

The dissenting opinions argue that the enforcement of the initially tainted contract rendered it a "continuing offense" into the §10(b) limitations period, [Id., at 429 et seq. (Frankfurter, J. dissenting), and at 434 et seq. (Whittaker & Frankfurter, J. J., dissenting)] and therefore constitute an actionable violation of the Act.

Both the majority and the dissent in Bryan Mfg. Co. recognize that the alleged unfair labor practice was essentially and indivisibly rooted in the original unlawful execution of the contract: a "continuing violation" existed, if at all, solely by virtue of circumstances existing at the time of the execution of the contract prior to the 10(b) period. Not one Justice argues that the contract was in violation of the Act without reference to its origin prior to the 10(b) period.

Bryan is thus entirely inapposite to the instant case because the violation herein of §8(b)(6) between January 9, 1973 and June 30, 1973 was entirely independent of the execution of the

predecessor contract between Stevenson and Local 456, and of the initial hiring of Korchma in January 1972. The majority in Bryan itself described the distinction:

> [T]he vice in the enforcement of this agreement is manifestly not independent of the legality of its execution, as would be the case, for example, with an agreement valid on its face or with one validly executed, but unlawfully administered." [Id. at 423; emphasis added.]

Byran might be applicable to a §8(b)(6) situation such as the instant case if Stevenson had had no unit work to be performed in 1970 when the contract was executed or in 1972, when the latest shop steward was hired, but had subsequently bought a truck which Korchma in fact drove. In such event, the contract itself (which was illegal upon execution and thereafter, upon the hiring of Korchma) arguably could not be held to constitute the basis for a §8(b)(6) finding since no illegal causing of payment for non-services would have taken place within the §10(b) period. The rationale for the Supreme Court's holding in Bryan would appear to apply since an unfair labor practice charge under §8(b)(6) would hinge on the initial execution and subsequent hiring - both of which events occured during a period sufficiently remote to render recollection unreliable and witnesses scarce. The gravamen of the charge would lie outside of the §10(b) period and not within.

In the instant case, even assuming, as the Board does not, that the 1970-1973 Agreement was validly executed, its performance became unlawful as soon as the Union "caused" Stevenson "to pay"

money to Korchma for services which were not performed and not to be performed. The existence and proof of a §8(b)(6) violation between January 9 and June 30, 1973 do not rely in any way on pre-10(b) events.

Thus, for example, if Stevenson had daily use for jockeying services on its one and only construction jobsite and had signed a valid three-year contract in January 1971 with Respondent Union only to find that the job was completed ahead of schedule in January 1973, continued adherence by the Union to the contract provisions that certain employees be paid would, from that time forward, entail a causing of Stevenson to pay a driver for non-performance and would thus constitute a violation of §8(b)(6). The enforcement within the 10(b) period by the Union of its originally valid contract has been transformed by intervening and legitimate circumstances into a prospective violation of §8(b)(6). To conclude that the valid execution of the contract in January 1971 and the hiring of employees between January 1971 and January 1973 pursuant to that contract perforce precludes the finding of a §8(b)(6) violation thereafter, would require a convoluted logic.

Yet the Board in the instant case goes further. Despite overwhelming evidence that the predecessor contracts were illegal in their inception and throughout their duration, the Board

refuses to find a violation within the §10(b) period, apparently on the grounds that the illegal contract execution and employee hiring occurred outside.

Aside from the illogic of the Board's holding, we suggest that it distorts the public policy served by §8(b)(6). Rarely, if ever, will a prospective charging party possess economic power or leverage equal to that of the Respondent Union. For it must be assumed that a company which embraced the financial burdens of a featherbedding provision, did so for failure of a viable alternative. Yet it is precisely in the context of such an economic imbalance that the employer will be most reluctant to challenge the union - particularly in an industry which has uniform labor costs and which can usually pass these on to the public. If charges are filed, therefore, it will only be as a last resort and usually after a long period of submission.

The Board holding herein, we respectfully submit, improperly and unnecessarily disarms §8(b)(6) of much of its practical force: it protects the already powerful violator against the legal redress of the victim on the grounds of his prior submission.

CONCLUSION

For the foregoing reasons we respectfully urge this Court to order the National Labor Relations Board to modify its order to include reimbursement of wages and all reasonable expenditures directly incurred in the employment of Arpad Korchma for the period commencing January 9, 1973; and to enforce the Board's order, as so modified, and in all other respects.

Dated: February 10, 1975

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* * *

(142) [Mr. Golovensky:] Let me ask this because we have a judge here from Washington. And I think this is the first we hear of it, and it is an $5,000 or part of that impact, and I would like to know whether the union would agree with us that we need maintain under this contract, which is being challenged for its legality under 8(b)(6), that we need maintain a teamster more than the two or three hours assuming that's what it is of jockeying we need.

MR. SHEEHAN: We don't work by the hour. Never have. We work by the day.

MR. GOLOVENSKY: Your Honor, we are placed in this position. Would the union agree that if we store up the jockeying that we could have a union man come to do the jockeying for a period of one or two weeks?

MR. SHEEHAN: Your Honor, may I make a suggestion or request, that this matter be discussed off the record?

JUDGE SEFF: Off the record.

(Discussion off the record.)

JUDGE SEFF: On the record.

BY MR. GOLOVENSKY:

Q. Mr. Knesich, I think before the break in the hearing we were talking about Mr. Korchma's approach to you which you placed at the end of September, some three months after

* * *

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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NATIONAL LABOR RELATIONS BOARD, :

Petitioner, :

- against - : AFFIDAVIT OF SERVICE

LOCAL 456, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, : Index Nos. 74-2384, 75-4001

Respondent. :

J. R. STEVENSON CORP., :

Intervenor. :

----------X

STATE OF NEW YORK) ss.:
COUNTY OF NASSAU)

SUSAN SCHREINER, being duly sworn, deposes and says:

That deponent is not a party to the action, is over 18 years of age and resides in Garden City Park, New York.

That on the 13th day of February, 1975 deponent served two copies of the within Brief and Supplementary Appendix on behalf of Intervenor, upon the following attorneys in this action by depositing a true copy of same enclosed in a post paid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Post Office within the State of New York:

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Susan Schreiner
SUSAN SCHREINER

Sworn to before me
this 3rd day of
February, 1975.

Bruce K. Miller

BRUCE K. [illegible] Notary Public
State of [illegible] No. 01-[illegible]
Qualified [illegible] County
Cert. filed in [illegible] County
Commission Expires March 30, 1976